Supreme Court, U.S.
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92-431
No.

IN THE

Supreme Court of the United States

October Term 1992

MARSHALL P. SAFIR

Petitioner,

v.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, UNITED STATES LINES, INC., Debtor, and S.S. AMERICAN LANCER, S.S. AMERICAN AQUARIUS, S.S. AMERICAN APOLLO, S.S. AMERICAN LYNX and S.S. AMERICAN ASTRONAUT, their engines, tackles, apparels, furnishings, equipment and appurtenances, in rem,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

MARSHALL P. SAFIR
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August 28, 1992

CASILLAS PRESS, INC., 1717 K STREET, N.W., WASHINGTON, D.C. 20036

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QUESTIONS PRESENTED

Whether the court below was in error when it denied recall of a mandate where uncontroverted evidence of fraud on the court both extrinsic and intrinsic was present.

Whether the fact situation presented here represents a base broad enough for this Court to clarify the extrinsic-intrinsic distinction where *Hazel-Atlas Glass v. Hartford Empire* and *U.S. v. Throckmorton* appear to conflict.

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IN THE

Supreme Court of the United States

October Term 1992

No.

MARSHALL P. SAFIR

Petitioner,

v.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, UNITED STATES LINES, INC., Debtor, and S.S. AMERICAN LANCER, S.S. AMERICAN AQUARIUS, S.S. AMERICAN APOLLO, S.S. AMERICAN LYNX and S.S. AMERICAN ASTRONAUT, their engines, tackles, apparels, furnishings, equipment and appurtenances, in rem,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Opinions Below

The Order of the Court of Appeals of June 2, 1992 denying the motion to recall the mandate of April 13, 1990 is appended (1a, 2a). The mandate of April 13, 1990 denying leave to appeal the denial of intervention in the admiralty court is appended (35a). The Order of the Court of Appeals of August 12, 1987 is appended (25a-29a). The order of the Court of Appeals of March 24, 1988 is appended (30a-31a)

Other relevant decisions include *Safir v. Prudential Insurance Co. of America, et al, cert. denied*, 111 S.Ct. 129 *rehearing denied* 111 S.Ct. 544 (1990); *Safir v. Nickerson cert. denied*, 112 S.Ct. 57 (1991) *rehearing denied* 112 S.Ct. 622 (1991); *Safir v. U.S. Lines, et al.*, 792 F.2d 19 (2nd Cir. 1986) *cert. denied*, 479 U.S. 1099 (1987); *Safir v. United States Lines, et al*, 616 F.Supp. 613 (EDNY 1985); *Safir v. Dole*, 718 F.2d 475 (D.C. Cir. 1983) *cert. denied*, 467 U.S. 1026 (1984) *rehearing denied*, 467 U.S. 1268 (1984); *Safir v. Klutznick*, 526 F.Supp. 921 (D.D.C. 1981); *In Re Marshall P. Safir*, 108 S.Ct. 496 (1987); *In Re Marshall P. Safir*, 108 S.Ct. 788 (1988); *Safir v. ICC & CSX Corp.*, 831 F.2d 283 (2nd Cir. 1987) *cert. denied*, 109 S.Ct. 520 (1988), and *In Re American President Lines, Inc.*, 804 F.2d 1304 (D.C. Cir. 1986).

Jurisdiction

The jurisdicton of this Court is invoked under 28 U.S.C. § 1254(1). The judgment below was entered on June 2, 1992.

Statutes Involved

11 USC § 544(a)(2)
11 USC § 551
46 USC § 922(a)(3)
46 USC § 953
49 USC § 11321(b)

Statement of the Case

On June 2, 1992, the United States Court of Appeals for the Second Circuit denied a motion filed by the petitioner on February 27, 1992, to recall the mandate of April 13, 1990, in the above-entitled action on grounds of fraud on the court (1a). The 1990 Mandate had denied leave to appeal the distribution of $45,000,000 to Prudential Insurance Co. of America as mortgagee of the U.S. Lines fleet under an agree-

ment whereby U.S. Lines in reorganization was to receive more than $10,000,000 therefrom. Under circumstances described *infra*, the District Court for the Southern District of New York (R. Owen, J.) had denied leave for petitioner to intervene to protect his preferred lien claim which arose before the recordation and endorsement of the Prudential Mortgage.

The motion to recall the mandate was supported by an Affidavit sworn to by this petitioner on February 24, 1992, in the Second Circuit. The affidavit is appended (3a thru 24a) and is based on newly discovered evidence in the record of a New York Civil action for malpractice titled *Prudential Insurance Co. of American v. Dewey, Ballantine, Bushby, Palmer and Wood; Haight Gardner Poor and Havens;* and *Gilmartin, Poster and Shafto,* Docket No. 43581 in New York Supreme Court, Appellate Division, First Department. The decision of that court of August 15, 1991 is cited 573 NYS2d 981 (1991) and has been certified to the Court of Appeals of New York State where oral argument is scheduled for September 9, 1992.

The record in the Appellate Division voluminously corroborates the earlier exposition of the facts giving rise to the lien in *Safir v. Prudential Insurance Co. of America, et al.*, Supreme Court Docket 90-02, *cert. denied* 111 S.Ct. 129, *rehearing denied,* 111 S.Ct. 544 (1990). The justification for a new petition is the fraud on the court in the concealment of the existence of the lien by the use of false vessel documentation prepared by counsel for U.S. Lines Inc. and Prudential Insurance Co. of America acting in concert with CSX Corporation and its subsidiary Sea-Land Service Inc. in ship sale transactions on the one hand, and on the other hand, the persuasion of a panel of the Second Circuit (Newman, Kearse, Miner C.J's) to enjoin this applicant from ever being in a position to pursue a remedy by foreclosing his right to appeal the acquisi-

tion of the U.S. Lines ships by CSX-Sea Land or the distribution of the their proceeds to others. The panel issued a preliminary injunction with a $5,000.00 sanction payable to CSX Corp. on August 12, 1987 (25a-29a) followed by a permanent injunction against access to the Second Circuit by Judge Newman's panel on March 24, 1988 (30a, 31a).

These injunctions prevented the merits of a maritime lien claim *authorized by the panel's own modification* of a district court injunction in *Safir v. U.S. Lines, et al.*, 792 F.2d 19, 25 (2nd Cir. 1986) from being reviewed thereafter in the Second Circuit. However, during the months of March and April of this year when the Recall Motion was *sub judice*, the sale of another former U.S. Lines vessel, the S.S. United States was taking place in the Fourth Circuit, in the District Court for the Eastern District of Virginia. Petitioner Safir moved to intervene in that action on May 7, 1992, claiming entitlement to the proceeds of the admiralty sale for the same reasons as set forth in his Affidavit of February 24, 1992, and the law of admiralty as recently explained by this Court in *Exxon Corp. v. Central Gulf Lines Inc.*, 111 S.Ct. 2071 (1991). The Affidavit of February 24, 1992 was the primary exhibit to the motion in the record of the Virginia district court.*

The district court took no action on the motion. However, by an order dated May 14, 1992 based on a hearing held without notice by the parties to the applicant, the proceeds of the sale ($2,600,000.00) were distributed to the plaintiff CSX and the Connecticut National Bank, intervening plaintiff (as trustee of that vessel's First Preferred Ship Mortgage). This applicant then appealed to the Fourth Circuit as an aggrieved non-party to the action under the Fourth Circuit I.O.P. Rule 12.2. This case is docketed as *CSX Corp. v. Marshall P. Safir, Applicant for Intervention* No. 92-1677.

*The Department of Justice through U.S. Attorney Richard Cohen by letter August 27, 1992 requested copies of all relevant filings in this litigation.

CSX and the Bank separately moved to dismiss the appeal on the grounds that the petitioner was prevented from pressing his preferred lien claim by the existing Second Circuit injunctions. They further demanded sanctions for violation of the Second Circuit injunctions. However, after consideration of the motions and the response thereto, the Court issued an order on July 21, 1992, directing applicant-appellant's brief to be filed by August 11, 1992, and responses by appellees (the parties) fourteen (14) days thereafter. Applicant's informal brief was filed August 8, 1992.

The order of July 21, 1992, states:

> "The Court will review the entire record on appeal for possible *meritorious issues;* it will not limit its review solely to the issues raised by *the parties* briefs. (Emphasis added.)

Under the circumstances, a decision on the merits of the Safir claim as a preferred maritime lien, *inter alia*, appeared to be at hand. After this petitioner's brief was filed, however, the Fourth Circuit on motion by CSX suspended further briefing pending decision on the motion to dismiss.

The decision in the Fourth Circuit, meaningful as to monetary entitlement for the petitioner, neverthless may or may not address head on the unconscionable scheme described in the uncontroverted Second Circuit Safir Affidavit of February 24, 1992, which was not remedied but instead, avoided by the appropriate court. Petitioner believes that only this Court in an exercise of its power of supervision can cleanse, in the words of Professor Moore, "the species of fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases." The personal damage to this petitioner pales by comparison.

Reasons for Granting the Writ

The petitioner in his Affidavit appended hereto states that the fraud on the court documented primarily from the files of the case of *Prudential Insurance Co. v. Dewey Ballantine, et al.*, Docket 43581 in New York Supreme Court Appellate Division 1st Dept., represents an affront to the public interest and the integrity of the judicial system more deeply disturbing than the fraud uncovered in *Hazel-Atlas Glass Co. v. Hartford Empire Co.*, 322 U.S. 238 (1944).

The affront is more disturbing not only because of the dollar magnitude of the fraud and the putative prestige of the attorneys who perpetrated it, but because of the number of attorneys — officers of the court — who knew of its existence and cynically took advantage of it. The fraud *inter alia* involved the deliberate misplacement of a decimal point in the recordation of a ship mortgage reducing a mortgage of $98,000,000 to $98,000.00. The total recovery of *in rem* ship sales in New York and California was $65,000,000. Although less has been written about the $98,000,000 decimal point "error" in the newspapers than has been written about the hubris of a member of the bar in the Kay Scholer case, the same mind set as to the latitude of judicial advocacy was evident — only it was taken one step further in this case.

Fraud on the court arose from the actions that these attorneys, acting in concert, took to prevent this petitioner from ever being in a position to receive an adjudication of his maritime contract lien claim on the merits. *Greater Coastal Exp. v. I.B.T., etc.* 86 FRD 131, 139 (1980). *Keys v. Dunbar*, 405 F.2d 955, 957-958 (9th Cir. 1969).

To this end, the attorneys for U.S. Lines and others used false statements filed with the U.S. Coast Guard in violation of 46 U.S.C. § 922 to convince the Court of Appeals that Safir

had no claim against the assets of U.S. Lines (see Order of August 12, 1987, 28a). In this case, the original fraud was not on the Court of Appeals, but on the Department of Transportation (Coast Guard), just as in *Hazel-Atlas* it was upon the Patent Office. (*See Toscano v. C.I.R.*, 441 F.2d 930, 935 (9th Cir. 1971), *also Greater Coastal Express v. IBT*, 675 F.2d 1349, 1364-65 (4th Cir. 1982).

The deliberately planned scheme required the filing not only of false affidavits, but perjured testimony before a bankruptcy court (19a) and corrupt briefs on appeal. Cf. *Prudential Insurance Co. of America v. S.S. American Lancer et al.*, 870 F.2d 867 (2nd Cir. 1989). Moreover, the scheme did not end with entry of the appellate injunction against the petitioner. Like the litigation in *Hazel-Atlas*, the attorneys for U.S. Lines, Prudential, and others have succeeded, up to now, in their attempt to forever seal their deception by the payment of large sums as legal fees to the participants from the division of the spoils engineered by maritime counsel — the proceeds of the ship sales which rightfully belong to the petitioner.

And as in *Hazel-Atlas*, they succeeded in cloaking their wrong for several years by using the fraudulently obtained judgment as a precedent with respect to the validity of the Safir claim. Compare *Root Refining Co. v. Universal Oil Products Co.*, 169 F.2d 514, 517 (3rd Cir. 1948), *cert. denied* 335 U.S. 912 (1948). The fraudulently obtained injunction is being used in just such a manner by counsel for CSX in the Fourth Circuit in *CSX v. Safir supra*. See Excerpt of Reply of CSX to Response in Opposition to Motion to Dismiss Appeal (32a-34a).

The Safir Affidavit sets forth the factual basis for the intrinsic/extrinsic fraud the distinction of which was described in *United States v. Throckmorton*, 98 U.S. 61 (1878). In the instant case, it is clear that the fraud actually prevented the preferred maritime lien issue from being joined at the appellate level in the Second Circuit. This is extrinsic fraud by definition. It now appears that

the fraud has placed a decision on the merits of the lien on hold in the Court of Appeals for the Fourth Circuit as well, pending the outcome of this petition.

The motion to recall the mandate under Rule 27(c) met all the criteria of *Hazel-Atlas* for action by an appellate court to grant full relief either where facts are admitted or where a trial of the facts is necessary. The facts set forth in the Safir Affidavit were uncontroverted and are true as documented. This Court has the power to reverse the course of this wearisome litigation and justice requires it. This Court has always followed the rule of equity to the effect that under certain circumstances, one of which is after-discovered fraud, relief will be granted against judgments regardless of the time of their entry. *Marshall v. Holmes*, 141 U.S. 589 (1981).

Two circumstances have come together with sufficient force as to make the extraordinary relief appropriate. The first was the decision of the Court in *Exxon Corp. v. Central Gulf Lines, Inc.*, 111 S.Ct. 2071 (1991), which, by the timing of its filing, while the Petition for Certiorari in *Safir v. Nickerson* was *sub judice*, was portentous. The significance of *Exxon* is its importance against the continuance of the existing injunction in the Second Circuit affecting Safir's rights to liens against the ships of the contract violators and the proceeds of their sales if that occurred.

The significance of *Exxon* is that it *does not* represent a change in maritime law as to liens. It is simply a clarification of decisional law which was known to the officers of the Court — the putatively distinguished admiralty counsel representing Safir's adversaries in this extensive litigation. The significance of *Exxon* is that the Supreme Court re-affirmation of *Archawski v. Hanioti*, 350 U.S. 532 (1956); *Krauss Bros. Lumber v. Dimon S.S. Co.*, 290 U.S. 117 (1933); and *Kossick v. United Fruit Co.*, 365 U.S. 731 (1960); formed the basis of the Petition

for Writ of Certiorari in *Safir v. Prudential Insurance Co. of America, et al.*, in Docket 90-02 only six months before.

Exxon held that the nature and subject matter of the contract at issue is the focus of standing and not the status of the claimant at any given time. Safir, therefore, contrary to the Order of August 12, 1987, had standing based on the nature of his claim as the intended third-party beneficiary of a maritime contract. Moreover, his lien status for remedy under the contracts, well known to admiralty counsel of his adversaries, was as set forth on pages 9 through 20 of that petition.

The second circumstance which establishes the foundation for the extraordinary relief herein requested is the documentation of the fraud on the court flowing from the hemorrhage of affidavits of the best and brightest of the New York bar, who in their zeal to defeat one another in their self-limited falling-out, overlooked the fact that the public file at the New York State Appellate Division damned them all.

The Safir Affidavit with the help of that file makes clear that in 1986, renegotiation of the mortgage by Amendment 1986-1, Prudential knew that mortagor's representation, that no preponderant prior maritime lien claim existed, was false and that the requirement of 46 U.S.C. § 922(a)(3) was instead made in bad faith.

Moreover, Prudential's new counsel, Weil Gotshal & Manges (Dewey, Ballantine was discharged contemporaneous with the ill-fated mortgage renegotiation) and US Lines new counsel, Milbank, Tweed, Hadley and McCloy, were well aware of the Safir claim and of the circumstances surrounding the frantic April 1986 mortgage renegotiation, when the bankruptcy filing of US Lines occurred in November of 1986. When these law firms moved to prevent Safir from protecting his claim by supporting CSX-Sea Land in the appellate injunc-

tion, they implicated themselves in the *perpetuation* of the fraud. "Loyalty to a client by an attorney does not demand that he act dishonestly or fraudulently — on the contrary his loyalty to the Court as an officer thereof demands integrity and honest dealing with the court. And when he departs from that standard in the conduct of a case he perpetrates a fraud upon the court." (Moore F.P.P. ¶60:33 citing *Southerland v. Irons*, 628 F.2d 978 (6th Cir. 1980).

The court below has on several occasions in the past reviewed fraud on the court claims and has established its own prerequisites for such a finding. The sophisticated counsel domiciled in New York are fully aware of these. First, that the aggrieved party have the opportunity to fully litigate the issue of fraud in the original action. *Leber-Krebs Inc. v. Capitol Records*, 779 F.2d 895, 899 (2nd Cir. 1985). They saw to it that Safir had no such opportunity before that court in 1987, nor when he was denied intervention by Judge Owen in *Prudential v. S.S. American Lancer, et al.*, in SDNY Docket 87-5782. Second, that there was jeopardy for fraud on the court if an attorney or attorneys be implicated in perpetrating or perpetuating the fraud. *Kupferman v. Consolidated Research & Mfg. Co.*, 459 F.2d 1072, 1078 (2nd Cir. 1972). These substituted attorneys seriously affected the integrity of the normal process of adjudication when they prevailed upon the court below to issue the injunctions of 1987 and 1988 for the purpose of disposing of the fraudulently documented vessels of US Lines by holding out that Safir had no meritorious maritime contract claims against the assets (vessels) of US Lines.

They knew that such claims were on file in *Safir v. US Lines, et al.*, in Docket 85-0864 EDNY against various subsidy contractors since October 1987, and that Judge Nickerson refused to allow investigation of the merits of those claims or to permit intervention in the bankruptcy court to pursue them.

They knew that the unconscionable scheme so effectively contained in the Eastern District, was in jeopardy by Safir's resort to the original jurisdiction of the Court of Appeals in the appeal of actions taken by the Interstate Commerce Commission as a violation of the Panama Canal Act, 49 U.S.C. § 11321(b), in approving the merger of CSX, a rail carrier, with Sea Land, a ship line who operated through the Panama Canal. When these attorneys, with full knowledge of the encumbrance of the Safir lien on the vessels, held out to that court that the Safir claim was vexatious, meritless and deserving of sanction, they thought they had closed the "loophole" of the Second Circuit's original jurisdiction.

The Safir affidavit should satisfy this Court that there is now a preponderance of evidence of fraud directly on that court which was not obtainable in 1987-1988 to warrant reopening of the appeal under § 11321(b) for divestiture, as well as reopening the reorganization of US Lines. For the latter see — *Nichols v. Alker,* 235 F.2d 246 (2nd Cir. 1956), also *In Re Intermagnetics America,* 926 F.2d 912, 917 (9th Cir. 1991). The Safir Affidavit should satisfy this Court to direct reopening on the appellate level of the admiralty proceeding in *Prudential v. S.S. American Lancer* in SDNY Docket 87-5842; *cf. Rio Grande v. Otis,* 90 U.S. 458 (1874). The Safir Affidavit warrants the issuance of the Writ of Mandamus to the District Court for the Eastern District in Docket 85-0864 to proceed with that action as well. *In re Sanford Fork and Tool Co.,* 160 U.S. 247, 255-256 (1895); *Reserve Mining v. Lord,* 529 F.2d 181 (8th Cir. 1976).

The denial of the motion for leave to intervene in the admiralty proceeding was particularly egregious because in that action Safir claimed fraud but the district court for the Southern District of New York held no evidentiary hearing and found laches to deny access. Safir informed the district court even before the 1992 revelations that the Decimal Point controversy

had been a meaningless deceitful exercise because his lien primed both the first and second fleet mortgages. Under these circumstances, it was incumbent on the court to use every means available to seek the truth. "We believe truth is more important than the trouble it takes to get it." *Publickers v. Shallcross*, 106 F.2d 949, 952 (3rd Cir. 1939), *cert. denied*, 208 US 624 (1940). Laches of an intervenor does not preclude relief. *Roof Refining Co. v. Universal Oil Products Co.*, *supra* p. 525.

Instead, intervention was rejected from the bench with the following evaluation of the merits of the claim:

> "And I conclude that you probably don't have a lien against these vessels because lines attach to vessels because of somebody who serves on them or somebody who has a cargo in them or something of that kind."

The above quotation is the sum total of the Court's deliberation. Contrast *Exxon*, *Archawski* and *Krauss Bros.*

Conclusion

The definitions of fraud on the court agree on one premise. Where there is fraud to which an attorney is a party there is fraud on the court. *Lockwood v. Bowles* 46 FRD 625, 632 (DDC 1969), *Sutter v. Easterly*, 189 S.W. 2nd 284, 354 (Mo. 282 1945). There have been questions raised in the legal journals and the courts as to whether *Hazel-Atlas* has repudiated *Throckmorton*. Since the facts in this case are four square with both decisions, petitioner diffidently suggests this may be a part of the Court's agenda for clarification of this point. Petitioner, however, can maintain no diffidence as a citizen in holding back his dismay and consternation at the unwillingness of the Second Circuit to uncover a fraud against itself and to secondarily rectify the injustice to the petitioner. The issue here

is whether *Hazel-Atlas* remains viable to remedy a wound to the Court.

In addition to the actions of the officers of the court in the affront to the integrity of the judicial system, there are issues of great moment in this maritime litigation reflecting on the future of the American merchant marine and its role in the next century. Proof of the extrinsic scheme and its complete success to date is conclusive. And no equities have intervened through transfer of the fraudulently procured ships to an innocent purchaser. The purchasers were not innocent. They were knowing gamblers. The Safir petition should be granted.

Respectfully submitted,

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Dated: August 28, 1992

United States Court of Appeals
FOR THE SECOND CIRCUIT

Second Circuit Rule 27(a) governing use of this form is reproduced on reverse of Page 2. More requirements than supporting affidavit may be attached.

PRUDENTIAL INSURANCE CO. of AMERICA

- against -

S.S. AMERICAN LANCER, et al

MARSHALL P. SAFIR, Complainant-Intervenor

Use short title

90 - 7239

Docket Number

NOTICE OF MOTION

state type of motion

for Recall of Mandate

MOTION BY: *(Name, address and tel. no. of law firm and of attorney in charge of case)*

MARSHALL P. SAFIR, pro se
271 Grand Central Parkway
Floral Park, NY 11005
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Gilmartin Poster & Shafto
Weil Gotshal & Manges
McCutcheon Black Verleger & Shea
Milbank Tweed Hadley & McCloy

Has consent of opposing counsel:
A. been sought? ☐ Yes ☒ No
B. been obtained? ☐ Yes ☒ No

Has service been effected? ☐ Yes ☐ No

Is oral argument desired? ☐ Yes ☒ No
(Substantive motions only)

Requested return date:
(See Second Circuit Rule 27(b))

Has argument date of appeal been set:
A. by scheduling order? ☐ Yes ☐ No
B. by firm date of argument notice? ☐ Yes ☐ No
C. If Yes, enter date: _____

EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL

Has request for relief been made below? ☐ Yes ☐ No
(See F.R.A.P. Rule 8)

Would expedited appeal eliminate need for this motion? ☐ Yes ☐ No

If No, explain why not:

Will the parties agree to maintain the status quo until the motion is heard? ☐ Yes ☐ No

Judge or agency whose order is being appealed: Hon. RICHARD OWEN and the MANDATE OF THIS COURT APRIL 13, 1990 denying leave to appeal

Brief statement of the relief requested:

VACATION OF ORDER DENYING LEAVE TO APPEAL
AND RECOVERY OF RELEASED FUNDS TO CUSTODIA LEGIS.

Complete Page 2 of This Form

By: *(Signature of attorney)* [signature]

Appearing for: *(Name of party)* [signature]

Appellant or Petitioner: ☐ Plaintiff ☐ Defendant
Appellee or Respondent: ☐ Plaintiff ☐ Defendant

Signed name must be printed beneath: MARSHALL P. SAFIR

Date: 2/27/92

ORDER

Kindly leave this space blank

Before: Hon. WILFRED FEINBERG, Hon. WILLIAM H. TIMBERS, Hon. GEORGE C. PRATT, Circuit Judges.

IT IS HEREBY ORDERED that the motion be and it hereby is ~~XXXXXX~~ denied

ATT 1

UNITED STATES COURT OF APPEALS
FILED
JUN 2 1992
ELAINE B. GOLDSMITH, CLERK
SECOND CIRCUIT

FOR THE COURT,

ELAINE B. GOLDSMITH, Clerk

June 02, 1992

1a

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

IN ADMIRALTY
Docket No. 90-7239
AFFIDAVIT IN SUPPORT OF MOTION UNDER RULE 27(C)

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,
Plaintiff,

-against-

S.S. AMERICAN LANCER,
S.S. AMERICAN AQUARIUS,
S.S. AMERICAN APOLLO,
S.S. AMERICAN LYNX, and
S.S. AMERICAN ASTRONAUT,
their engines, tackle, apparel, furnishings,
equipment and appurtenances, *in rem,*

Defendants,

MARSHALL P. SAFIR,

Complainant-Intervenor.

AFFIDAVIT OF MARSHALL P. SAFIR IN SUPPORT OF MOTION TO RECALL MANDATE UNDER RULE 27(c) OF THIS COURT

MARSHALL P. SAFIR, being duly sworn, deposes and says:

1. Since March 24, 1988, I have been denied access to this Court as a matter of right by an injunction against "filing in this Court any appeal, motion, petition or request for relief of any sort concerning in any way United States Lines, Inc., CSX Corporation, Sea-Land Corporation, or any person, company or entity engaged in the transportation of goods by sea, without having

sought and obtained leave of this Court for such filing''. (See Order of March 24, 1988, Exhibit A hereto.)

2. This Order was based on the conclusions set forth by this Court in an Order of August 12, 1987 (Exhibit B hereto), and as a result of these orders this Court subsequently denied leave on February 21, 1989 to file a Petition for Writ of Mandamus to Judge Eugene Nickerson for an order to allow summons to be served and case to proceed in *Safir v US Lines et al* (EDNY Docket 85-0864 (Exhibit C). The Safir affidavit of January 9, 1989 in support of the motion for leave to file the Petition is Exhibit D hereto.

3. The District Court for the Eastern District in *Safir v. US Lines et al*, Docket 85-0864 on May 12, 1989 had also denied leave to amend the complaint with a maritime lien claim (Exhibit E) or to intervene in the Bankruptcy Court for the Southern District for the purpose of protecting his *in personam* contract claim to $20 million of the proceeds of the sale of US Lines vessels (Exhibit F), which had been apportioned to the Debtor as residual in *CSX-Sea Land* purchase of vessels (rebuilt C-6s, Lancers and others) where the Maritime Administration as guarantor under Title XI of the Merchant Marine Act '36 had seized the vessels after paying off the bond holders on the defaulted bonds. This Court through its Chief Clerk on June 29, 1989 refused to accept the motion by citing the injunction of March 24, 1988. (Exhibit G.)

4. On April 13, 1990, this Court denied a request for leave to appeal the denial of intervention and for a stay pending appeal (Exhibit H) of the distribution of the proceeds of the sale of eight additional Lancers, five of which were sold in the Southern District and the proceeds of $45,000,000 were then *in custodia legis* in New York. Affiant then petitioned for certiorari in the Supreme Court which, although denied, has since been vindicated as will be described *infra*. The Petition for Cer-

tiorari in *Marshall P Safir v. The Prudential Insurance Co. of America, United States Lines, Debtor and the S.S. American Lancer et. al.* of June 27, 1990 is appended hereto as Exhibit I (Eye).

5. This affidavit is filed to support the motion to recall the mandate denying leave to appeal the denial of intervention in *Prudential v. S.S. American Lancer et. al.*, Docket 87-5842 in the court below (Exhibit K) and issue mandate to Judge Richard Owen to set aside his grant of summary judgment to Prudential releasing $45,000,000 of the Lancer proceeds and to take such additional action as may be required to recover the proceeds for the account of Safir as prior lienor.

6. While this affidavit refers to other mandates of this Court in related actions which resulted in limiting affiant's access to the federal courts of this circuit, these mandates in *SAFIR V. USL et al.*, and *SAFIR v. I.C.C. & CSX* and their potential future recall are not the subject of the motion this affidavit specifically supports. Affiant will show that the injunctions against him in both the District Court and the Court of Appeals were procured as a result of a calculated and premeditated scheme perpetrated by certain attorneys-officers of this court. The scheme was designed to prevent the presentation of a meritorious claim to the Court because appellate awareness of the case would uncover a fraud they thought they had buried seven years earlier.

7. Affiant will show that the motives of certain of these attorneys were primarily extrinsic and will show that those attorneys whose interest was intrinsic knew that a fraud on the court was being perpetrated and yet dishonestly participated because they considered it in the best interest of their clients. The grounds are fraud on the court by these officers of the court in concealing the existence of a known but unrecorded priming maritime lien on the vessels of their clients by actively preventing the complaining party from making a full and fair pre-

sentation of his claim in any Court of this Circuit including this one.

8. The vindication of the Safir claim is the decision of the Supreme Court on June 3, 1991 in *Exxon Corp. v. Central Gulf Lines*, 111 S.Ct. 207 (1991) which overruled *Minturn v. Maynard*, 17 How 477 (1855). The *Exxon* decision, in reversing this Court [904 F2d 33 (1990)] corroborated all the arguments this affiant tried to set forth under the constraints of *Safir v. US Lines* 792 F.2d 19, 25 (2nd Cir. 1986), in the Eastern and Southern Districts as to the merits of his own maritime contract monetary claims but which he was prevented from making. The Exxon decision corroborated all the arguments affiant attempted to make to *this* Court but was prevented from making by the existence of the March 24, 1988 injunction. This affidavit will show that this Court's decision to issue that injunction was based on the assumptions that the transactions contemplated between US Lines Debtor and CSX-Sea Land for the transfer of ownership of the Lancer vessels C6 and C8 were made in good faith and that Safir had no priming lien claim to bar the transfer.

9. Affiant will show that the certificates of documentation of the vessels on file at the U.S. Coast Guard were false, and that the affidavits of good faith submitted by the owner, US Lines stating that no lien existed prior to the recorded and endorsed 1st Preferred fleet mortgage were known to the mortgagor US Lines and to special admiralty counsel to the mortgagee Prudential Insurance Co. of America in 1978 and as renegotiated in 1983 known to the mortgagor US Lines and special admiralty counsel to the mortgagee Prudential. Affiant will show that the mortgagee was not aware of his impaired collateral until some time later but became aware of the infirmity before the mortgage was amended on April 14, 1986, recorded on April 15, 1986 and endorsed on the Lancer vessels in May, June and July 1986. Affiant will show that the original fleet mortgage covered sixteen

Lancer and other class vessels, and that by the time they were sold, Prudential knew that the eight Lancers purchased by Sea-Land (on which the Maritime Administration held mortgage guarantees) were as encumbered by the Safir prior lien as those Lancers later sold to Sea-Land and the Puerto Rican Maritime Authority (PRMA) on which Prudential held the mortgage as amended in 1986 without the government guarantees.

10. The Supreme Court in deciding *Exxon* six months after denying the Petition in Docket 90-02 (Exhibit Eye) specifically explained its reversal of *Minturn* by citing all the Court's precedents of the past relied on by me in my petition which dealt with the expansion of admiralty jurisdiction to grant equitable remedies for maritime contract violations. The Court specifically reaffirmed *Archawski v. Hanioti*, 350 US 530 (1956) and *Krauss Bros. Lumber Co. v. Dimon S.S. Co.*, 290 US 117 (1933), which dealt with the issues of unjust enrichment and maritime lien status therefrom as the judicial view of applicable law from which the narrow Minturn approach to agency contracts was irreconcilable and long since discredited. The nature of the maritime subsidy contract breach as to follow *Exxon* and qualify for the *in rem* remedy, is set forth in the Petition in Docket 90-02 under the heading "The Safir Claim is a Maritime Lien" (Exhibit Eye, pp. 10-20)

11. This Circuit based its injunction against me on the grounds that "Safir has no standing to complain of any purchase by CSX-Sea Land of the assets (vessels) of United States Lines . . . to the extent he claims standing as a competitor of Sea Land, that claim fails because Safir has not been in the shipping business for twenty years". The Supreme Court in *Exxon* held that it is inappropriate to focus on the status of the claimant in the denial of access to the Court rather than the nature and subject matter of the contract at issue. The rationale on which *Minturn* rested — that an action cognizable in *assumpsit* was ex-

cluded from admiralty and that a claimant required some form of lien interest by hypothecation of the vessels to sue in admiralty on a maritime contract were no longer the law of the Supreme Court — even where the libel reads like *indebitatus assumpsit*. Nor was this the law since *Krauss* (1933) and *Archawski* (1956). Thus, the Safir claims based on the affirmed judgment as to liability in *Safir v. Klutznick*, 526 F.Supp. 921 (DDC 1981) of the owners and their vessels built and/or *rebuilt* with the fruits of unjust enrichment were both cognizable as to monetary relief in admiralty from the time they arose in 1965-1966 and meritorious under the existing modification by this Court of the district court injunction in *Safir v US Lines*, 792 F2d 19, 25 (1986).

12. The Safir claim reading like *indebitatus assumpsit* was in 1987 and is now under the *Krauss Bros.* precedent a libel *in rem* against those vessels *a fortiori* where monetary relief against one of the owners, the defunct U.S. Lines is no longer feasible. That monetary claim against the Lancer vessels now exceeds, with interest, $300,000,000.00. CSX-Sea Land was fully aware of their jeopardy when they took the chance in the purchase of the Lancers that the injunction would not hold for the useful life of the ships.

13. CSX-Sea Land and PRMA also relied on admiralty court sales to discharge all liens on the vessels, most of which were built as early as 1954 and in operation as fighting ships in 1965-67 crewed with wage subsidized officers and seamen insured by subsidized insurance premiums and repaired, maintained and *rebuilt* (see Exhibit J) with subsidized payments to shipyards. Those that were built between 1968 and 1971 were paid for with subsidy funds relating to the period of contract violation in 1965-67 but withheld by the government until 1971. This was explained in *Safir v Gibson*, 330 F.Supp. 225 (EDNY 1971).

14. Such reliance was misplaced because the vessels were transferred to Sea Land and PRMA by US Lines Debtor, in a deliberately planned scheme to defraud not only this lienor but the Department of Transportation (U.S. Coast Guard), the Bankruptcy Court for the Southern District, the District Court sitting in admiralty under the *Rio Grande v. Otis* Rule and this Court under the *Hazel-Atlas* Rule. In my Petition for Certiorari in Docket 90-02 (Exhibit EYE pp. 4 through 8), I set forth my knowledge, as of that time of the proceedings in the Bankruptcy Court before Judge Buschman, the District Court before Judge Owen and this Court as cited in *Prudential v. S.S. American Lancer, et al.*, 870 F2d 867 (1989). Since the Exxon decision, I have had access to the public file of the litigation between Prudential and the law firms, Dewey Ballantine Bushby Palmer and Wood; Gilmartin Poster & Shafto; and Haight Gardner Poor & Havens, Docket 43581 in NYS Supreme Court, Appellate Division, 1st Dept. The most recent decision in the case is Exhibit L hereto. The case has been certified to the NY State Court of Appeals. The brief of Prudential has been filed and the Gilmartin brief is due unless extended on January 30, 1992.

15. The record in the Appellate Division voluminously corroborates the exposition of the facts set forth on pages 4-8 of the Safir Petition in Docket 90-02 with the additional evidence that the fraud perpetrated by these law firms in concert with United States lines represents extrinsic fraud on the Court which began in 1978 with the negotiation of a mortgage agreement between United States Lines and Prudential.

16. First, the record reveals that Robert Poster, Esq. was an associate and later a partner in the firm of Kirlin Campbell and Keating from the years 1966-1973 when that firm exclusively represented US Lines in maritime litigation in this circuit against the Safir claim. Cf. *Safir v. Gibson I & II*

(1969-1970) and thereafter in the administrative hearings culminating in 1973 with the Maritime Subsidy Board finding in its Docket S-243 that the subsidy contracts had been violated, Mr. Poster left the firm in 1973 to join the Gilmartin firm in which he continued to represent United States Lines according to his testimony before the United States Bankruptcy Court SDNY on March 21, 1988 *In the Matter of McLean Industries*. (See Exhibit M, Transcript of March 21, Hearing, p. 26-27.)

17. In negotiating the 1978 deal wherein McLean Industries purchased United States Lines from Walter Kidde Co., McLean was represented by Haight, Gardner. Malcom McLean the sole owner of the purchaser and former owner of Sea Land Service was fully aware of the Safir claim, having been through his earlier ownership of Waterman Steamship Lines, a member of the AGAFBO conference found to have acted in concert to destroy my ship line in 1965-1966.

18. In the 1978 leveraged buyout of US Lines, Prudential, as lendor was represented by Dewey Ballantine who in turn had engaged Shea & Gardner of Washington, D.C. as Special Admiralty Counsel. Shea & Gardner was at that time the lead counsel of the so-called "non-trade" lines in the Safir litigation since 1965 and who in 1978 represented American President Lines, Inc. in APL's appeal to the U.S. District Court for the District of Columbia from the Secretary of Commerce finding in my favor that US Lines and APL had violated their maritime contracts where Safir was the intended third-party beneficiary. The record of the relationship of these admiralty firms from 1978 through 1986 is set forth in the affidavit of E. Deane Turner Esq. of January 30, 1990 in the record of the Prudential-Dewey Ballantine litigation which is Exhibit N hereto.

19. The Turner affidavit indicates that Shea & Gardner did not inform its client Prudential of the US Lines liability in 1978. Shea & Gardner representing APL had intervened in *Safir & Gibson*, 432 F2d 137, 145 (2nd Cir) (Friendly J.) cert. denied 400 U.S. 942 (Safir II). This Court in *Safir v. US Lines*, 792 F2d 19, 22 (1986) cited Safir II in 1970 as having settled the contractual violation (subject only to administrative confirmation of Safir's qualifying criteria). Shea & Gardner as Special 1978 Admiralty Counsel to Prudential, and Haight Gardner 1978 Admiralty Counsel to McLean and Gilmartin Poster & Shafto as 1978 Admiralty Counsel to US Lines (the corporation) were also aware, as maritime experts that Judge Friendly had, in *United States v. S.S. Lucie Schults* 343 F2d 897 (2nd Cir 1965) concluded that under *Krauss Bros. v. Dimon S.S. Co.*, supra, there would be a lien for an unjustly enriching overpayment even though a libel asserting the lien was not filed until years later.

20. Therefore, it is indisputable that Poster, Haight Gardner and Shea & Gardner as admiralty experts knew that the Safir maritime contract claim arose before the recording and endorsement of the Prudential mortgage and under *Krauss Bros.* was a lien against the Lancer. It is apparent from the Turner Affidavit that at least in 1978 neither his firm Dewey Ballantine, nor Prudential his client was aware of the prior lien on the 16 vessels under the mortgage.

21. In the period between 1978 and until 1983 when the mortgages were refinanced, the Safir claim had been further affirmed as to liability by the judgment in *Safir v. Klutznick*, 526 F.Supp 921 (DDC 1981) which was then being appealed by US Lines. At that time John W. McConnell of Haight Gardner was maritime counsel to Moore McCormack Lines Inc., (the original parent but then reorganized into a subsidiary of Moore-McCormack Resources Inc.), a "trade" co-defendant

with US Lines in the contract breach, and as counsel defended Moore McCormack in an Involuntary Petition in Bankruptcy that I filed against Moore McCormack based on the "Klutznick" judgment in 1983-1984.

22. The Turner affidavit shows that John McConnell was also Special Maritime Counsel to Prudential at that same time, although the documents show that Haight Gardner was becoming reluctant to take full responsibility for any drafting of the 1983 amendments to the Lancers refinancing, deferring to Dewey Ballantine and seeking identity primarily as counsel to General Electric Capital Corp. The Turner affidavit indicates that Haight Gardner correspondence began to be addressed to both General Electric and Prudential as one which emphasized a dual allegiance whereas Turner tried to tie Haight Gardner to a statement that the representation was as special admiralty counsel responsible to Dewey alone. McConnell's name did not appear on the opinion. At no time in his obligation of diligence as counsel to either Prudential, or presumably to General Electric, did McConnell impart his knowledge that the Safir lien was an unrecorded encumberance on the vessels which arose prior to his firms representation of McLean in 1978.

23. Instead, Haight Gardner in 1983 began to pass to others the responsibility for the good faith of the 1978 commitment that the vessels were unencumbered by a priming Safir lien. The concurrent opinion letters of Dewey Ballantine and Haight Gardner to Prudential in 1983 show that the final assurances as to the security of the mortgage as a First Preferred Ship Mortgage was based merely on "reliance of on corporate officers of USL corporate documents and certificates of public officials". (Exhibit P; and "on the Opinion Letter of Gilmartin Poster & Shafto," Exhibit Q.) Accordingly, William B. Bru, President of US Lines signed the 1983 fleet mortgage cover-

ing 16 ships as "free of any lien, encumbrance obligations or liability whatsoever . . . other than Permitted liens" (at Article 1 §3 with attached list of vessels) and signed an affidavit that the mortgage instrument "was made in good faith and without any design to hinder, delay or defraud any existing or future creditor or any lienor of any vessel mortgaged by said mortgage". (See Exhibit R, excerpted 1983 Mortgage Agreement.)

24. In 1985, affiant filed a complaint under the ancillary jurisdiction of the District Court EDNY in *Safir v US Lines*, Docket 85-0864 seeking the remedy promised by this Court in *Safir v. Gibson*, 417 F2d 972, "to make it up to the victim for the burden" that the unjust enrichment of the contractors had imposed on him. In that action John McConnell, Esq. and Richard Ashworth, Esq. of Haight Gardner weighed in as counsel for US Lines rather than Robert Poster, Esq. of Gilmartin Poster & Shafto. The appearance of Mr. Ashworth and Mr. McConnell as counsel of record for US Lines is memorialized in *Safir v. US Lines, et al*, 616 F.Supp. 613, 614 (ENDY 1985). The appearance of Mr. McConnell as counsel to US Lines is further memorialized in *Safir v US Lines, et al*, 792 F2d 19, 20 (2nd Cir, May 27, 1986).

25. The action in Docket 85-0864 before Judge Nickerson therefore represented jeopardy to Haight Gardner as deep extrinsically as it did to the defendant parties intrinsically. *The McLean fraud regarding the encumbered collateral on which Prudential had loaned $150,000,000.00 could remain secret from the lender only if the holder of the lien, plaintiff Safir, could be reduced to the status of a non-person and permanently enjoined from the process of the federal courts*. This was essential because US Lines was rapidly becoming insolvent in the summer of 1985. Whether by the summer of 1985 Prudential knew of the fraud or became aware of it soon thereafter did not

materially affect their limited alternatives under the circumstances. Any claim of fraud by Prudential would expose its junior position to the priming unrecorded Safir lien.

26. Shea & Gardner had a double agenda, extrinsic as Prudential's 1978 special admiralty counsel (through Dewey), and intrinsic as lead counsel to American President Companies Ltd. (APL) to support the motion for injunction before Judge Nickerson in 1985. Leonard Garment's corresponding extrinsic agenda is described in *In Re Marshall P. Safir*, Petition for Certiorari Docket 90-1740 *cert. denied* October 8, 1991 *sub nom Safir v Nickerson*. (Exhibit X hereto.) APL was one of the contributors to the Nixon fund. In the summer of 1985 the extrinsic motives of Haight, Shea & Gardner, Gilmartin and the knowing intrinsic clack of maritime counsel to Lykes Bros. Steamship Co. Inc. (Kominers & Fort) and Farrell Lines (Foley Hoag & Elliot) were more than a match for the *pro se* plaintiff.

27. The District Court imposed the injunction on August 23, 1985. Affiant immediately appealed to this Court. On September 23, 1985 Haight Gardner sent its last communication to Prudential and thereafter claimed not to represent the mortgagee (in contradiction of the Turner affidavit).

28. On February 21, 1986 this Court heard oral argument on the Safir appeal wherein affiant pleaded leave to file an alternative to a statutory remedy — a claim sounding in maritime contract law. It was evident from the reaction of the panel, and not lost on the assembled admiralty bar in silent audience, that the injunction would be modified.

29. Thereafter from early March up to April 14, a hurried renegotiation of the Prudential mortgage took place as described in the affidavits attached hereto which, when read in the perspective of this Safir affidavit, represents a shuffle of white

shoes in a game of "Going to Jerusalem" with no law firm wanting to be without a chair when the music stopped. The affidavit of Suzanne T. Marquard Esq. of February 27, 1990 (Exhibit S) as counsel for Prudential clearly shows that from early March 1986 until the refinancing and mortgage agreement was signed on April 14, 1986, the heightened concern of the lender to receive assurances from counsel Poster as to the validity of the 1986 mortgage agreement was apparent. She stated that in spite of the default of the 1983 mortgage Prudential would not be willing to go forward with the needed restructuring unless greater assurances than heretofore given were supplied by Gilmartin Poster & Shafto in an opinion letter "favorable" to Prudential that the mortgage was valid and enforceable.

30. The fact that the 1986 mortgage amendment incorporating Article 1 §3 of the 1983 mortgage agreement warranting that no prior unpermitted lien or liability existed and signed by the Vice-president and General Counsel of US Lines, William Verdon Esq. with an affidavit of good faith as required under 46 USC §922(a)(3) was not considered to be satisfactory by Prudential. (See Mortgage Amendment 1986-1 as excerpted Exhibit T hereto.) Dewey qualified its April 14, 1986 letter to Prudential as follows:

> "No independent opinion is expressed herein as to matters of maritime or admiralty law as to which you have received the aforesaid opinion of Messrs. Gilmartin Poster & Shafto."
>
> (Exhibit V hereto).

With Dewey, Ballantine avoiding a maritime and admiralty opinion, its letter was worthless to Prudential and with Haight Gardner running away from any obligation to Prudential in spite of the understanding by E. Deane Turner, Esq. of their continuing representation as special admiralty counsel, the Gil-

martin Poster & Shafto "favorable" opinion letter was the only outside link available to validate the security of the lenders collateral. Mr. Verdon's status as a member of the bar notwithstanding.

31. Neil Eggleston Esq. representing Prudential in the malpractice litigation informed the IAS Court that Prudential requested that the Poster opinion letter state that "the mortgage was valid, that the documents were valid and that they would have the benefit of our security . . . We wanted the inside information that the borrower had about their opinion. Whether there is anything about this transaction that the mortgage was in any difficulty. Thats all we wanted. We didn't get it." (See Exhibit V, Transcript May 24, 1990, before Hon. Karla Moskowitz, pp. 29-31).

32. The Gilmartin Poster & Shafto letter (Exhibit W) was a carefully worded opinion which relied on the company documents with no independent evaluation. Nevertheless, Paragraph 14 of the letter stated:

> "To the best of our knowledge (having made inquiry in respect thereto) there is no suit, action, proceeding, investigation or audit pending or threatened at law or in equity before any court, administrative agency or other government authority or any jurisdiction which brings into question the 1986 amendments or the transactions contemplated thereby."

This signed statement was patently false coming as it did during this Court's deliberations after oral argument on February 21, 1986 and before the decision modifying the injunction on May 27, 1986 in *Safir v US Lines, et al* (1986). By this time even Dewey Ballantine knew it was false and yet, in collusion with Gilmartin and Haight Gardner, they allowed Paragraph 14 to

stand. Since that time, the evidence in the Prudential malpractice suit against its admiralty counsel is ineluctible that before April 14, 1986 Prudential also knew that Paragraph 14 as drafted was false but needed it as "favorable" to cover the good faith requirement of 46 USC 922(a)(3).

33. Even in 1978 it was clear that knowledge of bad faith by the mortgagee in the mortgage transaction defeats the mortgage's aspiration towards preferred status. *Matter of Meredosia Harbor and Fleeting Service,* 545 F2d 583, 587-588 (7th Cir 1976) cert. denied 430 US 967 (1976). No self-respecting officers of the court would approve the acceptance of Paragraph 14 of the Gilmartin Poster opinion letter knowing it was false but Dewey, Ballanine did. These unconscionable officers "complacently tolerated tampering with the administration of justice" (cf. Hazel-Atlas Rule) because by so doing they protected themselves from a later fraud action by Prudential by incriminating the desperate client in the fraud itself. The issue here is broader than that of a single litigant.

34. Once Prudential was thus compromised Haight, Gardner, Poor & Havens and Gilmartin Poster & Shafto were in a position to manipulate Prudential at will with no opposition from Dewey, Ballantine. These two firms Haight and Gilmartin who had, with McLean, perpetrated the fraud in 1978 on Prudential were in complete control, for the price of Paragraph 14 of the Gilmartin Opinion Letter, of the documentation of the mortgagee's security in an anticipatory bankruptcy financing. The Marquard affidavit reveals that no Prudential house counsel was present at the closing on April 14, 1986 (EXHS-R545) to guide their signatory one Vice President Heitzler, consent letters by Prudential having been signed prior to the meeting. See Heitzler affidavit excerpt EXH.Z hereto.

35. Much has been written in newspapers nationwide, in law publications and indeed in the opinion of this court in *Prudential*

v. S.S. American Lancer et al 870 F2d 867 (2nd Cir 1989) on the typographical decimal point error of April 14 whereby the 1986 mortgage Amendment was recorded and endorsed under 46 USC 921 as $92,000 instead of $92,000,000. The evidence from the Malpractice litigation makes clear that the decimal point placement was *not an error but a derivative second fraud on the court* by these officers of the court arising out of the incrimination of Prudential in the first one. The motivation was obvious given the bogus nature of the underlying legal instruments. Entitlement to the proceeds of sales thereunder as a result of arrest or bankruptcy, other than for Permitted liens, was subject to any artifice, trick or scam the original 1978 perpetrators of the fraud would wish to devise for both financial benefit on one hand and additional future protection against later Prudential reprisal on the other.

36. The dollar value of obligations (both the 1st and 2nd Preferred) was conditional only by the ability of counsel to continue to deny Safir, the priming maritime lienor, access to the courts. The strategy in April 1986 was to project the reality of the pending bankruptcy of US Lines using the "error" to transfer to the avoidance powers of the bankruptcy court under 11 USC 544(a)(2) control of the ships free and clear of all but $92,000 of the 1st and 2nd mortgage liens of Prudential and General Electric Capital Corp. The Marquard affidavit points out that under 11 USC 551 no junior lien holder (ie. GECC) receives any benefit when the senior lien is avoided (EXH.S.-R558). There is therefore no mystery in GE's replacement of Haight, Gardner with other counsel in *Prudential v S.S. American Lancer et al,* supra.

37. The decimal point "error" was accomplished with ease and hidden well until after the US L bankruptcy filing. Exhibits to the Marquard affidavit (R581-588) reveal that Poster of the Gilmartin firm assigned the actual tasks of document drafting.

All of the first mortgage amendments including 1st Preferred Fleet Mortgage Amendment #1 on the Lancers were assigned to Haight, Gardner. The drafting of Gilmartin's own opinion letter that Prudential was so concerned about was also assigned to Haight, Gardner!! The circumstances of the closing of April 14, 1986 are described in the testimony of Poster at the hearing of the bankruptcy court of March 21, 1988 (EXH.M-R826). Poster admitted that the document of most concern to Prudential, the mortgage on the Lancers also prepared by Haight, was brought forward in the closing minutes of the meeting with little or no time for review and that he advised his client (Verdon) to sign them. When Poster was asked by Judge Buschman who requested Haight to prepare these amendments he said "I have no idea." (ibid-826).

38. The Marquard affidavit reveals that no copies of the 1st Preferred Fleet Mortgage Amendment #1 were sent to Prudential on April 16, 1986. The affidavit states that Prudential had not received, from Haight, copies of the Mortgage Amendments to Prudential's Ship Mortgages and to Prudential and GECC's shared second ship mortgages, all of which had been recorded with the Coast Guard the day before April 15, 1986. In contrast, the final 1986 document list indicates that copies of the mortgage amendments protecting the ship builders and the banks secured interests were enclosed with the list. (EXH.S-R555-556) Prudential's house counsel further stated that the first knowledge she had of the "error" was in May 1987. The only document filed with the Coast Guard stating the $92,000,000 figure was merely an exhibit of the financing statement attached to the the official $92,000 mortgage document (R557).

39. After McLean filed for Chapter XI, Poster as Counsel implemented the scheme by soliciting the Bankruptcy Court

Order filed August 12, 1987 reported as *In Re McLean Industries* 76 B.R.328 (Bankr. SDNY 1987) which directed the debtor to file an adversary proceeding to effect such avoidance. On that same day August 12, 1987 this Court issued the injunctive order in *Safir v ICC & CSX* which triggered the arrest and sale of eight Lancers which realized a sum of $66,000,000. The proceeds were planned to be subject to decision by the bankruptcy court as to the debtor's claims under 11 USC 544 and 551. The Haight-Gilmartin scheme was working for full windfall over $92,000 to reorganize USL and McLean.

40. Primarily due to affiant's continuing efforts in the Supreme Court in 1987 to prevent dissipation of the ship proceeds to others and the uncertainty as to how long his injunctive restraint would remain in force, debtor agreed to forego the total windfall based on the spurious error and entered into an agreement with Prudential to divide the spoils in lieu of extensive litigation.

41. Judge Buschman in the hearing of March 21, 1988 and before he approved the later settlement raised a series of questions as to the bona fides of the decimal point error. The Court questioned how Prudential could have been on notice under 921(a) of 46 US Code when Haight Gardner had filed the mortgage under a consent referring to another document "when its clear in spades that yet another document (the mortgage amendment) obviously was not read." EXH.M (R841 842) Prudential's attorney stood mute. When Judge Buschman saw that Prudential's counsel made no move to accept the adversarial opening he invited to question Poster further, the Court agreed to the settlement. In *Re McLean Industries* 84 BR 340 (Bankr. SDNY 1988). It can be seen from the date of the Heitzler affidavit May 12, 1988, and indeed up to this day the decimal point scam remains characterized by Prudential

as "an obvious typographical error" EXH.Z (R1085). The exquisite nature of the "sting" demanded it. The solace the mortgagee derived was from the fact that 87.5% of a loaf that belongs to this affiant was better than nothing. The closest that Counsel for Prudential, Howrey & Simon (Neil Eggleston, of Counsel) came to an exposition of the true facts was in its brief of January 18, 1991 before the New York State Appellate Divisioon in regard to the Gilmartin opinion letter. Prudential's brief at footnote 9 states:

> "Judge Markowitz holding also goes too far in another respect. *If Gilmartin was not giving an opinion of the effectiveness of the mortgage amendments then Gilmartin could have issued its opinion letter even if it were aware of the error. Although Prudential has not accused Gilmartin of such fraudulent conduct,* Gilmartin's failure was nonetheless negligence and a breach of Gilmartin's duty to Prudential."
>
> (emphasis added)

42. Prudential's real case against Dewey, Haight and Gilmartin was not for malpractice but for fraud against all of them as insiders but Prudential could not afford to claim it. When this Court opened the door to a meritorious Safir maritime contract claim it was a historical fact that the claim arose long before the Prudential fleet mortgages of 1978, 1983 and 1986 were recorded and endorsed. The myth of the $92,000 decimal point error which was the overt injury for which Prudential has sued was always a "red herring." The fact that the Safir lien primed the mortgage would have prevented "good" practice from any better result.

43. Justice David Ross writing for the New York State Appellate Division (Exhibit L) discusses Prudential's predicament on pages 17-19 of the decision in regard to privity with the Gilmartin firm. The conclusion in New York is that absent

fraud, collusion, malicious acts or other special circumstances, an attorney is not liable to third parties, not in privity, for harm caused by professional negligence." All Prudential was required to do was to introduce Paragraph 14 or pinpoint documents in Poster's possession regarding the Safir claim to avoid summary judgment. This was not done.

44. The fact that it was not done is further evidence of bad faith which permeates Prudential's handling not only of the mortgage restructuring in 1985 but its role of injured innocence up to the present time. So long as Prudential was able to limit its malpractice and breach of contract claims to the myth of the bumbling typographical proof-reading of counsel Dewey Ballantine and the myth of the typing error of its back-sliding admiralty counsel Haight, Gardner its complaint gave the appearance of legitimacy. The Appellate Division, in its August 15, 1991 decision found in Prudential's favor for a trial of the issues. Fearful of carrying this shameful abuse of process any further, on August 16, 1991, the attorneys for Dewey Haight and Prudential filed a stipulation of discontinuance with prejudice and without costs signed by Judge Karla Moskowitz. (Exhibit W.)

45. When the Surpeme Court in Exxon explained that the hypothecation requirement had "long been discredited" and that "admiralty is not concerned with the form of the action, but with the substance" quoting *Krauss Bros. Lumber co.*, supra, and reaffirming *Archawski v Hanioti*, supra, the Court removed the last possible defenses to the priority of Safir's lien over the fleet mortgage. The maintenance of the suit by Prudential against Gilmartin in the New York State Court of Appeals, absent a claim of fraud, is reduced to a fig leaf to maintain a semblence of cover to the unseemly collusion of Prudential, since its discovery with the officers of the Court whose misrepresentations caused its sorry plight and this affiant's continuing injury.

46. Therefore, when this affiant was prevented from protecting his claim in this Court in 1987 against the sales of the Lancers for the recoupment of the bad faith mortgagor and mortgagee to CSX-Sea Land which resulted instead in the preliminary injunction of August 12, 1987, a fraud was perpetrated on this Court which exceeded the criteria of the Hazel-Atlas Rule — meeting the strict criteria of *US v Throckmorton*, 98 US 61 (1978) as to extrinsic motivation for independent action if necessary.

47. This Court relied on the integrity of Gilmartin now supported by US Lines new bankruptcy counsel Milbank Tweed Hadley and McCloy, CSX-Sea Land by Sidley and Austin, and Prudential by Weil Gotshal & Manges, all of whom knew that the mortgage was not entitled to preferred status. This reliance was also misplaced. There was no coincidence in the order of the Bankruptcy Court on August 12, 1987 lifting the automatic stay to permit the sale of the mortgaged Lancers and the March 24, 1988 Order of the Bankruptcy Court approving the deal for a division of the Lancer proceeds. All of these funds in addition to the recoveries of Prudential and the Maritime Administration rightfully belong to me. None of these disbursements would have taken place if this Court had not been induced to issue the injunctions of August 12, 1987 and March 24, 1988 in *Safir v. I.C.C. and CSX Corp. & Sea Land Corp. Intervenors*. All of the above pillars of the legal profession (to their lucrative benefit) used the appellate orders as weapons when they knew the underlying mortgage instrument was a fraud. Legal integrity became an oxymoron when the CSX cow catcher delivered them a cash cow.

48. Justice Hugo Black in HAZEL-ATLAS stated:

> Surely it cannot be that the preservation of the integrity of the judical process must always wait upon the diligence of litigants. The public welfare demands

> that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud.

I believe that the facts set forth in this affidavit represent a state of affairs more deeply disturbing than the HAZEL-ATLAS paradigm. In this Dickensian saga reminiscent of JARNDYCE v. JARNDYCE the lawyers should not be disposed to leave the courthouse laughing.

S/SMARSHALL SAFIR

Sworn to before me this
24th day of February, 1992
HENRY B. SEVILLA
NOTARY PUBLIC,
State of New York
NO. 41-01SE4718312

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twelfth day of August one thousand nine hundred and eighty-seven.

Present: HONORABLE JON O. NEWMAN,
HONORABLE AMALYA L. KEARSE,
HONORABLE ROGER J. MINER,
Circuit Judges.

IN RE: MARSHALL P. SAFIR, 87-3007
Petitioner.

MARSHALL P. SAFIR,
Plaintiff-Appellant,

v. 87-4037

INTERSTATE COMMERCE
COMMISSION ET AL.,
Defendants-Appellees.

FILED
AUG 12 1987
ELAINE B. GOLDSMITH
CLERK

ORDER

Pending before the court are various matters arising from litigation brought to this Court by Marshall Safir, whose prior litigation history is summarized in *Safir v. United States Lines. Inc.*, 792 F.2d 19 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 1323 (1987). On February 17, 1987, Safir filed a petition for review of a decision of the Interstate Commerce Commission in a matter captioned "Joint Application of CSX Corporation and Sea-

Land Corporation under 49 U.S.C. [§] 11321." The ICC decision is dated February 11, 1987, and identified as Finance Docket No. 30900 (Sub-No. 1). The ICC decision resulted from an application to the Commission by CSX Corporation and Sea-Land Corporation for a determination that acquisition of Sea-Land by CSX would not violate the Panama Canal Act, 49 U.S.C. § 11321. The ICC's decision determined, among other things, that CSX and Sea-Land do not compete, that the transaction is not prohibited by section 11321, and that the applicants may consummate the transaction at any time. (ICC decision at 13). The ICC officially issued its decision on February 24, 1987. The caption of Safir's petition for review also indicates that he is seeking a writ of mandamus. Though his papers are not entirely clear, it appears that he is attempting to challenge the ICC decision both by a petition for review, which alleges that it is legally incorrect, and by a petition for mandamus, which seeks an order requiring the Commission to exercise jurisdiction to an extent greater than Safir believes has occurred. Also on February 17, 1987, Safir filed with this Court a motion for a stay. Though the relief sought by this motion is also not clear, it appears to seek an order preventing the Commission from issuing its February 11, 1987, decision.

On May 7, 1987, the Commission filed with this Court a motion to dismiss Safir's petition for review for lack of jurisdiction. On May 11, 1987, CSX and Sea-Land (the latter now a wholly owned subsidiary of CSX) filed a motion with this Court to intervene as a respondent in the proceeding in which Safir petitions for review of the ICC decision.

On June 5, 1987, Safir filed with this Court a motion for a temporary restraining order. This motion seeks an order directed to the Bankruptcy Court for the Southern District of New York in connection with bankruptcy proceedings involv-

ing United States lines, Inc. In the bankruptcy proceeding, CSX is seeking approval of the Bankruptcy Court to purchase most of the assets of United States Lines. Safir seeks an order barring the Bankruptcy Court from approving the proposed sale of assets, pending disposition of Safir's petition to review the ICC decision concerning the CSX acquisition of Sea-Land.

Safir's motion, filed February 17, 1987, for a stay to prevent the Commission from issuing its February 11, 1987, decision, is DENIED as moot. That decision was officially issued on February 24, 1987.

The motion of CSX and Sea-Land to intervene in the proceeding in this Court in which Safir seeks a petition to review the decision of the Commission in GRANTED.

The motion of the ICC, supported by CSX and Sea-Land, to dismiss Safir's petition for review of the ICC decision officially issued February 24, 1987, is GRANTED. Safir has no standing to complain of the ICC decision concerning CSX's acquisition of Sea-Land. Safir's claim of standing, to the extent it can be discerned from his papers, is frivolous. To the extent he is claiming standing as a competitor of Sea-Land, that claim fails because Safir has not been in the shipping business for twenty years. The frivolousness of the claim is evident from its presentation despite the decision in *Safir v. Dole*, 718 F.2d 475 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1206 (1984), rejecting Safir's challenges to the refusal of the Federal Maritime Administration to recover subsidies paid to various carriers; Safir was held to lack standing based on a claim of competitive injury. To the extent that Safir claims standing because of alleged monetary claims against various carriers, apparently including United States Lines, those claims have repeatedly been determined to be without merit. *See Safir v. United States Lines, Inc., supra*, 792 F.2d at 24.

Safir's motion, filed February 17, 1987, for a petition for mandamus is DENIED. This motion is as frivolous as his petition for review.

Safir's motion for a temporary restraining order directed to the Bankruptcy Court is DENIED. This motion is also patently frivolous. Safir has no standing to complain of any purchase by CSX/Sea-Land of the assets of United States Lines. Moreover, his effort to obtain relief from this Court concerning ongoing proceedings in the Bankruptcy Court, without seeking leave of the District Court for the Eastern District of New York, appears to be in violation of the injunction that was affirmed as modified in *Safir v. United States Lines, Inc., supra*, 792 F.2d at 23. That injunction prohibits Safir, without first obtaining leave of the District Court for the Eastern District of New York, from "instituting in any federal court, including bankruptcy courts, any new action, motion, petition or proceeding arising from or related to [United States Lines, Inc.,' and others'] pricing practices in 1965 and 1966 or their then receipt of merchant marine subsidies." It appears that Safir's ultimate point in trying to block the purchase of the assets of United States Lines is to aid his claim, repeatedly rejected by the courts, that he is entitled to monetary relief against United States Lines.

In light of the vexatious and harassing nature of Safir's litigation tactics and the frivolous nature of the pending matters, it is hereby further ORDERED that Safir show cause in writing to this Court within thirty days why he should not be enjoined from filing in this Court any appeal, motion, petition, or request for relief of any sort concerning in any way United States Lines, Inc., CSX Corporation, Sea-land Corporation, or any person, company, or entity engaged in the transportation of goods by sea, without having sought and obtained leave of this Court for such filing.

It is further ORDERED that, as damages for frivolous litigation in this Court, Safir shall pay to CSX Corporation five thousand dollars ($5,000) within thirty days, Fed. R. App. P. 38, and that the Clerk of this Court will accept no further papers from Safir in any matter (with the exception of the required response to the order set forth above requiring Safir to show cause why an injunction should not issue) until Safir furnishes satisfactory evidence of payment of this monetary obligation.

JON O. NEWMAN
AMALYA L. KEARSE
ROGER J. MINER
Circuit Judges

This summary order will not be published in the Federal Reporter and should not be cited or otherwise relied upon in unrelated cases before this or any other court.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 24th day of March one thousand nine hundred and eighty-eight.

Present: HONORABLE JON O. NEWMAN,
HONORABLE AMALYA L. KEARSE,
HONORABLE ROGER J. MINER,
Circuit Judges.

IN RE: MARSHALL P. SAFIR, 87-3007
Petitioner.

MARSHALL P. SAFIR,
Plaintiff-Appellant,

v. 87-4037

INTERSTATE COMMERCE
COMMISSION ET AL.,
Defendants-Appellees.

FILED
MAR 24, 1988
ELAINE B. GOLDSMITH
CLERK

ORDER

This Court's Order of August 12, 1987, as amended by Order of September 21, 1987, required Marshall P. Safir to show cause within thirty days why he should not be enjoined from filing further papers in this Court concerning parties and topics therein set forth, without having obtained leave of this Court for such filing. Though this Court's Order of August 12, 1987, was not stayed, Safir elected to postpone his

response to the show cause order until the United States Supreme Court on January 25, 1988, denied his motion for rehearing of the Supreme Court's prior denial of his petition for a writ of mandamus. Safir filed his response to the show cause order on February 18, 1988, accompanying it with a request, purportedly pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure, for an order vacating our Order of August 12, 1987. Though Safir's response to the show cause order may well be untimely, we have considered it on its merits and conclude that it provides no basis for withholding an appellate injunction, in view of Safir's history of pursuing vexatious litigation.

Accordingly, it is hereby ORDERED that Marshall P. Safir, his agents, employees, and attorneys are enjoined from filing in the United States Court of Appeals for the Second Circuit any appeal, motion, petition, or request for relief of any sort concerning in any way United States Lines, Inc., CSX Corporation, Sea-Land Corporation, or any person, company, or entity engaged in the transportation of goods by sea, without having obtained leave of this Court for such filing. This Order shall be filed forthwith, and the injunction shall be effective from the date of filing of this Order.

It is further ORDERED that Safir's request to vacate this Court's Order of August 12, 1987, is denied.

JON O. NEWMAN
AMALYA L. KEARSE
ROGER J. MINER
Circuit Judges

EXCERPT FROM JUNE 30, 1992 REPLY OF CSX TRANSPORTATION, INC. TO RESPONSE OF MARSHALL P. SAFIR IN OPPOSITION TO CSX TRANSPORTATION, INC.'S MOTION TO DISMISS APPEAL

In further support of its Motion to Dismiss the Appeal of Marshall P. Safir ("Safir") and for its reply to "Response of Marshall P. Safir, *pro se*, in Opposition to Motion by Counsel for Plaintiff CSX Corporation to Dismiss Appeal" ("Safir Response to CSXT"), CSXT states as follows:

I. By filing his motion to intervene in the district court and by pursuing the present appeal, Safir has violated and continues to violate a court order entered *by the United States District Court for the Eastern District of New York.*

By order entered August 23, 1985 the United States District Court for the Eastern District of New York enjoined Safir from:

> (1) proceeding further in this action except to (a) seek appellate review by the court of appeals, (b) apply for *certiorari* to the Supreme Court, and (c) submit papers responding to applications, if any, by defendants (2) *instituting in any federal court, including bankruptcy courts, any new action, motion, petition or proceeding arising from or related to defendant's pricing practices in 1965 and 1966 or their then receipt of merchant marine subsidies.*

Safir v. United Lines, Inc., 616 F.Supp 613, 619 (E.D.N.Y. 1985) (emphasis added). This injunction was modified on appeal "to provide that Safir is prevented only from commencing additional federal court actions relating in any way to defendants' pricing practices or merchant marine subsidies during the 1965-1966 period *without first obtaining leave of the district*

court.'' 792 F.2d at 25 (2nd Cir. 1986) (emphasis added).

Safir states that his motion to intervene below and the present appeal are based on his claim to a maritime lien against ''the S.S. UNITED STATES and other vessels formerly owned by the defunct United States Lines, Inc. and others for violation of their maritime subsidy contracts with the U.S. Martime Administration in 1965-1966.'' *See* Response of Marshall P. Safir, *Pro Se* In Opposition to Motion by Counsel for Intervening Plaintiff-Appellee Connecticut National Bank to Dismiss Appeal'' (''Safir Response to Bank'') at p. 2. Thus, Safir makes it perfectly clear that he intends to pursue the same claim expressly proscribed in the district court's order and in the Second Circuit's opinion. This is precisely the same claim described as ''meritless'', ''vexatious'' and ''repetitive'' by those courts. *See* 616 F.Supp at 619 and 792 F.2d at 25.

Safir did not obtain leave of the United States District Court for the Eastern District of New York before filing his motion to intervene below or before instituting this appeal. Instead, Safir disingenuously misinterprets the clear and unequivocal language of the injunction against him. Safir would read the above quoted language to enjoin him only from filing frivolous actions. *See* Safir Response at p. 4. Rule 11 of the Federal Rules of Civil Procedure and Rule 38 of the Federal Rules of Appellate Procedure prohibit everyone from filing frivolous actions without the need for a court order. The Order of the district court, as modified, did not purport to simply compel Safir to comply with the Federal Rules of Civil and Appellate Procedure. The order was entered as a sanction for Safir's flagrant and repeated abuse of those Rules and his right of access to the federal courts. *Id.*[1]

[1]In upholding, with modification, the injunction issued against Safir by the district court the Second Circuit explained: ''Safir's abuse of the judicial process, despite his subjective conviction that he has suffered an unremedied injury, cannot be countenanced. In addition, Safir's failure to

Safir's defiant violation of a clear and unequivocal court order warrants dismissal of his appeal with prejudice and an award of double costs and fees pursuant to Rule 38 of the Federal Rules of Appellate Procedure and/or Rule 11 of the Federal Rules of Civil Procedure.

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pay costs and fees already assessed against him indicates that other types of sanctions would be unavailing." 792 F.2d at 25.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

90-7239

NOTICE OF MOTION

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,

- v -

S.S. AMERICAN LANCER

MARSHALL P. SAFIR
as complainant intervenor appellant

For leave to appeal and Stay pending Appeal.

UNITED STATES COURT OF APPEALS
FILED
MAR 9 1990
ELAINE B. GOLDSMITH
CLERK
SECOND CIRCUIT

Judge or agency whose order is being appealed Judge: Richard Owen.

Brief statement of the relief requested: Leave to Appeal and Stay Pending Appeal.

Complete Page 2 of This Form

By: (Signature of attorney)
MARSHALL P. SAFIR

Appearing for: Pro se
February 27, 1990

ORDER

IT IS HEREBY ORDERED that the motion be and it hereby is denied.

A TRUE COPY
ELAINE B. GOLDSMITH
/s/

Clerk

April 4, 1990

UNITED STATES COURT OF APPEALS
FILED APR 04 1990
ELAINE B. GOLDSMITH, CLERK
SECOND CIRCUIT

/s/ WILFRED FEINBERG

/s/ WILLIAM H. TIMBERS

/s/ GEORGE C. PRATT

Issued as mandate: April 13, 1990

Previous requests for similar relief and disposition: Leave to appeal and for injunction denied Sept. 20 1989

Statement of the issue(s) presented by this motion: Whether the district court proceeding should be stayed pending appeal in order to maintain the jurisdiction of this Court.

Brief statement of the facts (*with page references to the moving papers*): More than $44,000,000 has been disbursed to Prudential out of the ship sale proceeds, entitlement to which this applicant claims a priming maritime lien under 46 USC § 953 the validity of applicant's lien has not yet been adjudicated. If all of the funds were disbursed and the case dismissed by the district court without a stay applicants claim to these funds would be moot.

Summary of the argument (*with page references to the moving papers*): There was error in the district court denial of intervention in the case and there was error in the district court interpretation of its powers to deny leave to file an interlocutory appeal under 28 USC § 1292(a)(3) where the rights and liabilities of the proposed intervenor and the other parties was involved.